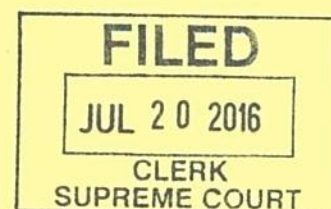


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2015-SC-000581



GARRARD COUNTY, KENTUCKY;  
JOHN WILSON; JOE LEAVELL;  
DOAN ADKINSON; RONNIE LANE;  
FRED SIMPSON; AND BETTY HOLTZCLAW

APPELLANTS

v.

*ON APPEAL FROM THE COURT OF APPEALS  
CASE NO. 2014-CA-00187-MR*

KEVIN MIDDLETON

APPELLEE

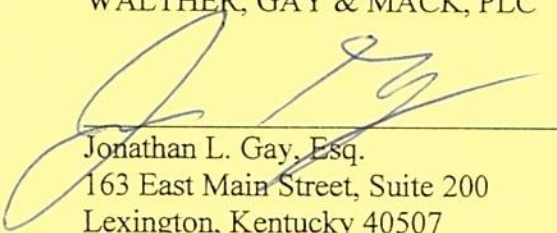
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**APPELLANTS' REPLY BRIEF**

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Respectfully Submitted,

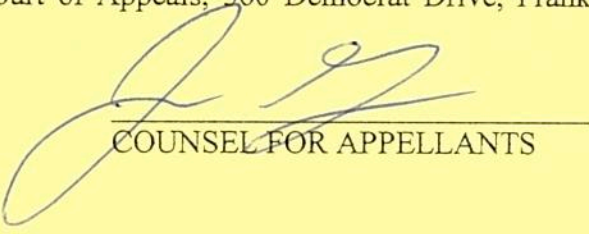
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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that the original and ten (10) copies were hand-delivered to the Kentucky Supreme Court and true and accurate copies of the foregoing were served upon the following via U.S. Mail, postage prepaid on this 20<sup>th</sup> day of July, 2016: Hon. J. Paul Long, Jr., 324 West Main Street, P.O. Box 85, Stanford, Kentucky 40484; Hon. Gerry L. Calvert, II, Calvert Law Group, 117 West Short Street, Lexington, Kentucky 40507; and Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.



COUNSEL FOR APPELLANTS

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## ARGUMENT

### **I. THE GARRARD CIRCUIT COURT CORRECTLY HELD THAT THE PLAIN LANGUAGE OF KRS 441.245 AUTHORIZES THE FISCAL COURT, FROM TERM TO TERM, TO SET THE SALARY OF JAILER**

The issue before the Court is whether a local fiscal court may set the salary of a jailer, who does not operate a full-service jail, from term to term pursuant to KRS 441.245, which reads as follows:

- (1) The jailer who operates a full service jail shall receive a monthly salary pursuant to any salary schedule in KRS Chapter 64 applicable to jailers operating a full service jail from the county jail operating budget.
- (2) No jailer holding office in the Commonwealth on or after January 6, 1999, shall receive an annual salary of less than twenty thousand dollars (\$20,000).
- (3) The salaries of jailers who are not subject to any salary schedule in KRS Chapter 64 may be set at a higher level if the salary does not exceed the constitutional salary limit applicable to jailers. These jailers' salaries shall at least equal the prior year's level and may be adjusted by the fiscal court for the change in the prior year's consumer price index according to the provisions of KRS 64.527.

This statute addresses four (4) distinct issues. It clearly provides that: (1) jailers who operate a full service jail shall be compensated pursuant to a compensation schedule set by the General Assembly (KRS 441.245(1)); (2) all jailers shall be paid at least \$20,000.00 (KRS 441.245(2)); (3) jailers who do not operate a full-service jail may be paid more than \$20,000.00 provided it does not exceed the constitutional maximum (KRS 441.245(3)); and (4) the fiscal court may adjust the annual salary during the term of the jailer based upon an adjustment in the value of the dollar due to changes in the consumer price index (the “rubber dollar doctrine”). (See KRS 441.245(3)).

The Garrard Circuit Court properly granted summary judgment in favor of Appellants regarding Appellee’s compensation during his elected term, holding that:

Pursuant to KRS 441.245(3), the Garrard County Fiscal Court has the statutory authority to set the salary of the Jailer from term to term and prior to any new term at any amount between the statutory-minimum annual salary of \$20,000.00 and the constitutional maximum annual salary allowed to jailers in the Commonwealth of Kentucky.

[T]he second sentence of KRS 441.245(3) does not limit the authority of the Garrard County Fiscal Court to set the salary of the Jailer from term to term but, rather, authorizes the Garrard County Fiscal Court to review the changes in the prior year's consumer price index according to KRS 64.527 and, in the discretion of the Garrard County Fiscal Court, to adjust the salary of the Jailer to provide the Jailer with the same purchasing power the Jailer had with his salary the prior year. This is not an impermissible change of a salary during the term of the Jailer but, rather, a permissible adjustment based on the "rubber dollar" concept under KRS 411.245(3) [sic] and KRS 64.527.

(See Garrard Circuit Court Order attached to Appellants' Brief as Exhibit 2 at 2).

The Garrard Circuit court zeroed in on the essence of Chapter 441 of the Kentucky Revised Statutes, and the control granted to fiscal courts under Chapter 441 with regard to the transporting of prisoners and salaries associated therewith. Appellee argues that:

Section 99 of our Constitution requires that every four years, a jailer 'shall be elected in each county' along with various other "county officers." (Ky. Const. Sec. 99). Therefore, short of a Constitutional Amendment, there shall always be a jailer elected in each county every four years.

(Appellee's Brief at 4) (emphasis in original). Appellee is incorrect. Section 105 of the Kentucky Constitution provides that:

The General Assembly may, at any time, consolidate the offices of Jailer and Sheriff in any county or counties, as it shall deem most expedient; but in the event such consolidation be made, the office of Sheriff shall be retained, and the Sheriff shall be required to perform the duties of Jailer.

(Ky. Const. Sec. 105). Our forefathers have clearly established that efficiencies in government are important and when the duties of the jailer can be performed by the sheriff, the General Assembly may, at any time, terminate the office of jailer. In 1998, the laws regarding jailers fundamentally changed. Jailers who operated a full-service jail were elevated to a state-wide

office and these jailers' salaries were set by the state (KRS 64.5275), while all other jailers who did not operate a full-service jail remained county officers whose salaries were set by the local fiscal courts. Just as the citizens of the Commonwealth of Kentucky have granted the General Assembly the authority to eliminate the office of jailer in the interest of fiscal responsibility, the General Assembly has granted the power to the fiscal courts to determine the duties of "county" jailers and how much they are paid. The Garrard Circuit Court correctly interpreted KRS 441.245 based upon a rational reading of the words contained in the statute.

## **II. THE KENTUCKY COURT OF APPEALS MISAPPLIED THE GOVERNING PRINCIPLES OF STATUTORY INTERPRETATION AND SHOULD BE REVERSED**

The Kentucky Court of Appeals failed to adhere to the principles of statutory interpretation. First, the plain meaning of the statute as interpreted by the Garrard Circuit Court provides a rational interpretation of all provisions of KRS 441.245 that grants local control to the fiscal courts over county jailers' salaries. This interpretation harmonizes KRS 441.245 with the statutory and constitutional law that grants local control to the fiscal courts with regard to the duties of the jailers. (*See* KRS 441.510(4) (jailer serving as transporting officer for prisoners); KRS 71.050 (jailer serving as bailiff); KRS 67.130 (jailer serving as custodian of public building; and Ky Const. Sec. 105 (elimination of the jailer if local government has no meaningful duties for the jailer)). Further, this interpretation protects fiscal responsibility at the local level and allows for adjustments based upon changes in circumstances relating to jailers' duties and responsibilities.

Appellee's reading of KRS 441.245 yields "absurd consequences" because it removes the power of the fiscal court to control salaries of jailers based upon the duties performed by jailers. If the salary, once set, must remain the same except for changes in the consumer price index,



then the fiscal court can never increase or decrease salaries based upon changes in the duties of the jailer. **In Appellee's Brief, he admits, for the first time, that the fiscal court can, in fact, lower the salary of a jailer from term to term.** Appellee states that:

Even though Garrard County has no jail, the record reflects that the Appellee's duties as Garrard County Jailer include the transport of prisoners; therefore, he is among the class of jailers to whom KRS 441.245(3) applies, and the salary for the Office of Garrard County Jailer cannot be reduced from one term to the next (unless his duties no longer include transporting prisoners, in which case **a reduction could be made but not until the next term of office**).

(See Appellee Brief at 9) (emphasis added). This judicial admission is precisely what the Garrard Circuit Court held. The salary of the jailer, from term to term may be reduced or increased based upon changes in duties. Appellee mistakenly believes that "transporting prisoners" is still relevant to salaries. The old law set the salary of jailers who only transported prisoners at \$12,000.00, which could not be increased at all. KRS 441.245(5). KRS 441.245(5) was repealed in 1998, together with KRS 441.245(4). Both of these old provisions tied the hands of the fiscal court to pay jailers only what they made in 1983 (adjusted for changes in the consumer price index) and to pay jailers who only transported prisoners \$12,000 (which was not adjusted for changes in the consumer price index). The new law repealed these two provisions, and, as admitted by Appellee, granted the fiscal court the authority to reduce salaries based upon any change in duties.

The Court of Appeals ignored the principles of reading the plain meaning in a rational manner and avoiding unreasonable results and proceeded to construe the statute strictly without regard to legislative history or other principles of statutory construction. Thereby, the Court of Appeals violated the rule that a court "will not read a statute strictly or literally where to do so



would lead to an unreasonable result.” *Dunaway v. DLX, Inc.*, 113 S.W.3d 632, 635 (Ky. App. 2002).

The Court of Appeals explained that its interpretation of KRS 441.245 was limited to a review of its plain meaning because, in its words, “[o]nly when the plain meaning of the statute’s language is ambiguous do we depart from a strict reliance on the words of the legislature.” (*See* Court of Appeals Opinion attached to Appellants’ Brief as Exhibit 1 at 8 (citation omitted)). In so doing, the Court of Appeals determined that it was “constrained by the patent language used by the General Assembly, regardless of whether we like the outcome” and held that the plain meaning of KRS 441.245(3) does not authorize a reduction in the salary of a jailer between terms. (*Id.* at 13).

Assuming for the sake of argument that KRS 441.245 is unambiguous, as the Court of Appeals determined, the limitation by which it constrained its review of the statute is in direct contravention with long-standing Kentucky precedent, which holds that a court need only look to the plain language of the statute unless the plain meaning “would produce an injustice or ridiculous result.” *Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). If the latter is the case, the courts are directed to “ignore the plain meaning of a statute” and look to other sources or methods to interpret the statute. *Id.*

KRS 441.245(3) provides that “the salaries of jailers who are not subject to any salary schedule in KRS Chapter 64 **may be set** at a higher level if the salary does not exceed the constitutional salary limit applicable to jailers.” (emphases provided). This provides clear unambiguous authority to the fiscal court to set the salary at any level between \$20,000.00 and the constitutional maximum. The plain reading of KRS 441.245(3) does not provide a date that the salary will be set. Notwithstanding this omission in KRS 441.245(3), the Kentucky

Constitution only allows for public officials' salaries to change from term to term. (Ky. Const. 161 and 235). Both Appellants and Appellee agree that the salary cannot change during the term and agree that it may be set prior to the new term, at a level higher or lower than the prior term. Therefore, under plain language of KRS 441.245(3), the fiscal court has the authority to set the salary of a county jailer at any level from term to term. There are no statutory or constitutional limitations on this authority.

Accordingly, since the Court of Appeals' Opinion presents a conflict with longstanding and firmly-established precedent regarding statutory interpretation, it should be reversed. This Court should interpret the plain meaning of KRS 441.245(3) giving meaning and significance to each sentence, and harmonizing it with other statutory provisions. The Garrard Circuit Court's interpretation harmonized KRS 441.245(3) both internally and with related statutes.

### **III. APPELLEE FAILED TO RAISE THE ISSUE OF ATTORNEY'S FEES AND COSTS TO THIS COURT PURSUANT TO CR 76.21 AND THEREFORE THIS ISSUE SHOULD BE DISREGARDED**

The Garrard Circuit Court properly found that Appellee is responsible for bearing his own fees and expenses related to this action under the American Rule. (Garrard Circuit Court Order attached to Appellants' Brief as Exhibit 2). On appeal, the Appellee argued to the Court of Appeals that the Garrard Circuit Court should have exercised its inherent equitable powers by directing Garrard County to pay his attorney's fees in this matter and that the circuit court's refusal to do so constituted an abuse of discretion. (Court of Appeals Opinion attached to Appellant's Brief as Exhibit 1 at 13). In its Opinion, the Court of Appeals noted that the Kentucky Supreme Court recently explained that:

If courts truly had equitable or inherent powers as broad as those assumed by [Middleton], the American Rule regarding attorney's fees as costs would be obliterated....[R]easonable minds can differ widely on what is 'equitable.' Without reasonable limits on the court's powers, the authority of the other

branches of government could be indiscriminately invaded. Power is given to the legislature to grant attorney's fees by statute. The parties may contract in advance of litigation to pay attorney's fees should litigation occur. The court may protect the integrity of the court by an attorney's fee sanction. But trial courts may not award attorney's fees just because they think it is the right thing to do in a given case. That is not what the law of Kentucky allows, and their inherit powers do not extend beyond stated law. In other words, a trial court may not ignore the law and apply its will, no matter how sound it believes the reason to be. This obviously would create legal chaos. *Bell v. Com, Cabinet for Health and Family Services, Dept. for Community Based Services*, 423 S.W.3d 742, 750 (Ky. 2014).

Here, Middleton's argument is simply that an award of attorney's fees would have been the right thing to do in this case. No statute or contract entitled Middleton to an award of attorney's fees. Middleton does not argue that such an award would have protected the integrity of the circuit court below. Consequently, there is no justifiable basis for such an award. This circuit court is affirmed in this respect.

*Id.* at p.13-14.

After the Court of Appeals rendered its Opinion, Appellants timely filed a Motion for Discretionary Review with this Court on October 5, 2015. This Court entered an Order granting discretionary review on March 9, 2016. Appellee had ten (10) days from March 9, 2016 to file a Cross Motion for Discretionary Review of the denial of attorney's fees and costs. At no time did Appellee file a Cross Motion for Discretionary Review pursuant to CR 76.21. Therefore, the decision of the Court of Appeals is final on this issue.

CR 76.12(4)(c)(v) requires the "Argument" section of an appellant's brief to make "reference to the record showing whether the issue was properly preserved for review, and if so, in what manner." Further, CR 76.12(4)(d)(iv) requires the "Argument" section an appellee's brief to conform to the requirements of paragraph (4)(c)(v) of this Rule requiring an appellee to make "reference to record-references and citation of authority." Here, Appellee was limited in his Argument section to issues that had been preserved for review and citation of references in the record to same. Appellee failed to comply with this rule as he raised the issue regarding



reimbursement of his attorney's fees and costs that was not before the Court and improperly utilized as a basis for reversal by this Court.

In *Mullins v. Ashland Oil, Inc.*, 389 S.W.3d 149 (Ky. App. 2012), the Kentucky Court of Appeals examined the requirements for appellate briefs and specifically addressed the requirements of CR 76.12. The court explained that:

The Kentucky Civil Rules of Procedure are a vital part of appellate procedure, as has been recognized for decades by the courts of this Commonwealth. Very recently, this Court expressed the importance in following these rules in appellate briefing:

'It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules "do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated. *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky 1977). Enforcement of procedural rules is a judicial responsibility of the highest order because without such rules "[s]ubstantive rights, even of constitutional magnitude,...would smother in chaos and could not survive.' *Id. Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky.App. 2010).

The court went on to provide detailed reasons for the procedural rules and concluding that "the rules are not only a matter of judicial convenience. They help assure the reviewing court that the arguments are intellectually and ethically honest." *Id.* at 697. In *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003), the Supreme Court of Kentucky also weighed in on the necessity of including a statement regarding preservation of issues and the consequences of failing to do so:

Rule of Civil Procedure CR 76.12(4)(c)(iv) mandates that a party indicate how an issue is properly preserved for review by an appellate court. LWC's briefs do not cite to where in the record this issue is preserved and we will not search the vast record on appeal to make that determination.

*Id.* In the case *sub judice*, any issues related to liability for attorney's fees and costs were not properly preserved for review. Appellee did not file a Cross Motion for Discretionary Review pursuant to CR 76.21 raising the issue before this Court. Thus, Appellee's Brief was limited to the issues that had been preserved for review by the Appellant.

The Court of Appeals recently discussed the remedies available for violations of CR 76.12(4)(c)(v). In *Hallis v. Hallis*, 328 S.W.3d 694 (Ky.App. 2010), the court stated:

Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only.

*Id.*; citing *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky.App. 1990). In the case at bar, because Appellee raised an issue on appeal which is not relevant to this proceeding, the Court should strike the Argument section of Appellee's Brief on pages 13 through 15 which relates to attorney's fees and costs.

**IV. ASSUMING, *ARGUENDO*, THAT THE COURT CONSIDERS THE ISSUE OF ATTORNEY'S FEES AND COSTS, APPELLEE'S ARGUMENT FAILS AS HE IS RESPONSIBLE FOR BEARING HIS OWN FEES AND COSTS RELATED TO THIS ACTION**

The so-called "American Rule" has been established in Kentucky, and provides that attorneys' fees "are not allowable as costs in absence of statute or contract expressly providing therefore." *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754, 755 (Ky. App. 1984) (citing *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973) and *Dulworth & Burress Tobacco Warehouse Co., Inc. v. Burress*, 369 S.W.2d 129 (Ky. 1963)). This rule is applicable to this case, and Appellee has not cited, and cannot cite, any statute or contractual agreement that entitles him to recoup his attorneys' fees.

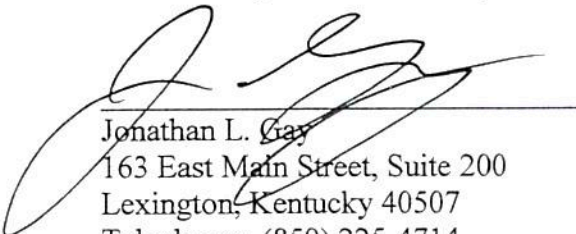
Instead, Appellee argues that attorney's fees should be provided out of equity. The "American Rule" does not foreclose the trial court from awarding attorneys' fees when, in the court's discretion, equity so requires. *Kentucky State Bank*, 663 S.W.2d at 755. Nevertheless, the circumstances that "justify this exception to the general rule have never been spelled out." *Cummings v. Covey*, 229 S.W.3d 59, 62 (Ky. App. 2007). What is clear, however, is the rule gives the trial court the discretion to award or refuse to award such fees, and that decision should not be set aside by an appellate court absent a showing that the underlying court abused its discretion. *Id.*

### CONCLUSION

The Court of Appeals erred in determining that Appellants do not have the authority to set the salary of the Garrard County Jailer from term to term. The Court of Appeals' misinterpreted KRS 441.245(3) and improperly relied upon *Wallace v. King*, 973 S.W.2d 485 (Ky. App. 1998). The Court of Appeals' decision will have far-reaching consequences throughout the Commonwealth of Kentucky and leads to an unjust result whereby local governments can **never** change the salaries of jailers, even when the duties of jailers change. It is incumbent upon this Court to correct this injustice.

Respectfully Submitted,

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